APPENDIX I

ACTION No. 505

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

MILDRED C. TRIVETTE - - - - - - - *Plaintiff*

VS:

NEW YORK LIFE INSURANCE COMPANY - *Defendant*

OPINION OF DISTRICT COURT

(Reporter's Note—After the introduction of all the evidence of the plaintiff, the defendant, by counsel, in the absence of the jury, moved the Court for a directed verdict in its favor. The following is the ruling of the Court on the defendant's motion for a directed verdict.)

The Court: Are you familiar with the case of Prudential Insurance Company vs. Tuggle's Administrator, 254 Ky. 814, 72 S. W. 2d 440?

Mr. Hinton: Yes, sir.

The Court: How do you distinguish this case from that one?

Mr. Hinton: I don't remember that case exactly.

The Court: I want to read that case to you. It was decided by the Kentucky Court of Appeals in 1934. I cannot distinguish that case from this case. If I am in error, I want you to point it out to me.

"The appellant seeks to reverse a judgment of $1,000 recovered against it by the appellee upon an insurance contract for the alleged accidental death of his intestate.

"Ivan Tuggle was an employee of the Louisville & Nashville Railroad Company at the time of his death. He was a locomotive fireman having been demoted from engineer, doubtless due to reduction in forces as a result of the depression. The railroad company was carrying a group insurance policy for the benefit of its employees. The decedent was protected by this insurance, which provided for the payment of a death benefit of $3,000.00, which has been paid, and provided further, in the event the death was a result of an accident, as defined in the policy, for an additional benefit of $1,000.00.

"The decedent died instantly from the effect of a gunshot wound on the 7th day of September, 1931. This tragedy occurred under the floor of the house where the decedent lived about 10:30 o'clock a. m. on that day. The house was built on a steep hillside, and the natural surface never had been disturbed. Consequently the lower side of the house was considerably above the ground, and the surface sloped upward at an angle of about forty-five degrees. The house was supported by a concrete foundation, and there was a door leading under the house at the lower side considerably toward the rear of the house. Coal and kindling were kept under there, and it was a dark and uninviting place. The public school in Hazard opened the morning of the tragedy, and the children of the community had gone to school. The appellee claims that the tragedy was an accident and that the decedent's death was the result of accidental means, as defined by the policy, which appellant denies, and as an additional defense it alleges that he committed suicide."

That is the identical position of the pleadings in this case.

"The policy is not before us. A master policy No. G1788 was issued, and that, it is alleged, is in the hands of the Louisville & Nashville Railroad Company. Certificates were issued to the railroad's various employees, and to Tuggle there was issued certificate No. 62485 but even that is not here, so we must gather the provisions of this contract from the pleadings. The following undenied allegation is copied from appellant's answer: 'The defendant says that in and by the terms of the said group insurance policy it is provided that no accidental death benefits shall be payable if such death resulted from suicide—whether the insured should be sane or insane'."

Was that the case here?

Mr. Blackwell: With two of the policies, suicide, sane or insane. The other two use the words "self-destruction."

The Court: "That must be taken as the part of the contract that is determinative of the rights of these parties, and the issue was whether Tuggle died from accident as alleged by appellee or committed suicide as alleged by appellant.

"There is evidence that the deceased was generally even tempered and very friendly; that he was a jolly, friendly fellow, and seldom angry; that ordinarily he had a smile for everybody; that he had a good position, and had a family to which he was devoted, and appellee had much evidence he was happily situated. Even so, he had been acting queerly. He had lain out some place all the night before the tragedy. His wife became alarmed during the night, and about 12:30 or 1 o'clock made inquiry about him of a neighbor, Mrs. Creola

Barnett. Mrs. Barnett saw him next morning, a short time before the tragedy. She asked him, 'Did you get your neck broke last night?' He answered that he had 'laid out last night'. About ten days before the tragedy the witness, Russell Eaton, passed him on the street, spoke to him and passed the time of day with him, but he passed on and disregarded the witness. They were well acquainted, and the deceased seemed to be in a study or troubled about something. The witness, Felix Gilbert, operated a restaurant near the railroad yards. About a week or ten days before the tragedy the deceased went to the restaurant and ordered a dinner. He stated that he was hungry and stayed at home until dinner was ready and then got mad and came off without his dinner. These facts are an indication of the change that had come over the deceased during a short time before the tragedy. These facts show a radical change in his disposition. One of the witnesses who had worked with him stated that he seldom became angry, but we find him getting so mad that he left dinner at home and ate at a restaurant. This was only a week or ten days before the tragedy.

"The evidence unmistakably shows that the place of the tragedy was dark and uninviting. It was so dark under there that one of the witnesses nearly stumbled over the body before he discovered it. They struck matches and used flashlights in finding their way to where the body was found and in making their observations. There was in this basement a steel barrel or drum standing on end against the concrete wall at the lower side and between the door leading under the house and street. Appellant claims that the deceased became disgusted with things for some reason and took his gun and went to this basement for the deliberate purpose of committing suicide. The arms of the deceased were long enough to permit him to rest

his gun across this barrel, to place the muzzle of the gun against the side of his head, and then reach back and trip off the trigger with his left hand.

"The bullet entered the left side of his head near his ear and passed through and came out at the top of his head. There was no powder burn on the side of his head; the gun was lying across the top of the barrel at the time it was discharged. A mark on the concrete wall indicated where, due to the recoil, the gun struck when it was discharged. The bullet entered the opposite bank in the line with the gun in the position we have indicated and was recovered in the presence of several persons. The only explanation we can see of the fact that the deceased was shot through his head as we have indicated is that he knelt, squatted, or hunkered down in front of the gun and deliberately committed suicide. The evidence shows without contradiction that under such facts there would be no powder burns. It seems that where the muzzle of a gun is held against the flesh and fired, the smoke and flame follow the ball into the wound. See Epperson v. Com., 227 Ky. 404, 13 S. W. (2d) 247. There were blood and brains on the inside of the muzzle of the barrel due to 'back suction' after the gun was discharged with the muzzle pressed against the side of the head. This was a Springfield army rifle, a powerful gun; a copper-jacketed 30-30 bullet was used. The gun had a range of over a mile and a half. The effect of the shot was to completely crush the head and to cause immediate death. These are most unusual circumstances to reconcile with the theory of accidental death. In the first place, there is no apparent reason why he should have had the gun in such a place. He did not drop it, for it was carefully placed on top of the barrel. He had to be kneeling, squatting, or hunkering down for the bullet to strike him in the head. If he had

been a little way from the muzzle of the gun, there certainly would have been no back suction of brains and blood into the end of the gun barrel, and there probably would have been powder burn. The most logical explanation of this strange set of facts is that he took the gun under there to commit suicide; that, after placing the gun on the barrel, he placed himself at the muzzle in a kneeling or squatting position with the end of the gun barrel against the side of his head. Then, by stretching in order to reach the trigger, he would necessarily tilt his head so the bullet would pass through and out at the top of his head. No other explanation is consistent with the facts.

"Appellant insists it was entitled to a directed verdict. In determining that we must take into consideration the presumption against suicide and the fact that by section 2062a-21 Ky. Stats., the copy of the death certificate filed is made prima facie evidence of the facts therein stated, and in this case it is stated Tuggle's death was the result of an accidental gunshot wound. Conceding but not deciding that it was competent for this certificate to contain such a statement, then its prima facie evidence effect is nothing more than a presumption. In this case, if no other evidence has been introduced, either of these presumptions would have been enough to require the giving of a directed verdict for the appellee, thus each of them has some weight, but how much? A fleck of eiderdown has some weight, yet it is so inconsiderable that, just as soon as almost any material thing is placed upon the opposing scale pan, the scale is tipped by the first substantive evidence for the appellant, though the idea is very prevalent that, when a litigant by evidence puts himself in a position where by some statute that position is said to be prima facie established, his position is

as secure as if it had a stone wall built about it, yet such is not the case.

"A man concealed by an enshrouding fog is just as securely protected from enemies by whom he is beleagured as the man who has made no more than a prima facie case. The one's protection is destroyed and he is left exposed and helpless when the rays of the sun or the winds scatter the fog, and the other finds his prima facie case destroyed by the first breath of substantive evidence against him.

"Presumptions are indulged in to supply facts, and do not arise where the facts are known. 22 C. J., p. 83, Section 25. Ordinarily, presumptions must give place when in conflict with clear, distinct, and convincing proof. 10 R. C. L., p. 868, Section 10. In Jones on Evidence, (2nd Ed.), Section 32, it is thus stated: 'Presumptions are only intended to take the place of facts and cannot be relied upon where the facts are shown; or that no presumption can stand in the face of facts. According to such authorities a presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts.'

"This is taken from Brunswick vs. Standard Accident Ins. Co., 278 Mo. 154, 213 S. W. 45, 50, 7 A.L.R., page 1213 (a suicide case); 'Presumptions are the bats of the law, which the light of evidence frightens and causes to fly away. Mockowik v. Kansas City, St. J. & C. B. R. Co., 196 Mo. 550, loc. cit. 571, 94 S. W. 256.'

"As to the contents of the death certificate, the rule is not different, as will appear from this which is taken from Jones on Evidence, (2nd Ed.), Section 509: 'Prima facie evidence in legal intendment means evidence which if unrebutted or unexplained is sufficient

to maintain the proposition and warrant the conclusion to support which it has been introduced, but it does not shift the general burden of proof, and stands only until the contrary is shown.'

"For example, see Federal Fidelity Co. v. Royal Mortgage & Finance Co., 252 Ky. 716, 68 S. W. 2d 25. The Federal Fidelity Company had a prima facie case established by its note with the name of Hoodenpyl signed thereto, but the moment Hoodenpyl denied that signature its prima facie case was destroyed, and a directed verdict against it was affirmed.

"A good illustration is afforded by Section 890, Ky. Stats., which makes the killing or injury of stock by an engine or car of a railroad company prima facie evidence of negligence, yet, if the evidence of no negligence is otherwise uncontradicted, there is no issue to submit to the jury. Crawford v. Southern Ry., 150 Ky. 741, 150 S. W. 990; Kentucky Central R. Co. v. Talbot, 78 Ky. 621; McGhee v. Guyn, 98 Ky. 210, 32 S. W. 615, 17 Ky. Law Rep. 794.

"With the presumption against suicide and the statements of this death certificate out of the way, let us look at the evidence.

"We have abundant facts proven from which it can be inferred Tuggle committed suicide, and a conclusion rested on an inference is sound. See Kidd v. Modern Amusement Co., 252 Ky. 386, 67 S. W. (2d) 466. We have no facts from which we can infer this was an accident. Of course, one may guess this was an accident by supposing Tuggle had taken his gun into this basement to kill a rat and discharged it accidentaliy, but a supposition has no legitimate support or habitation in judicial administration. Louisville & N R. Co. v. Mann's Adm'r., 227 Ky. 399, 13 S. W. (2d) 257; Kidd v. Modern Amusement Co., 252 Ky. 386, 67 S. W. (2d) 466.

"We are persuaded that this which is taken from a syllabus written by the court in the case of Agen v. Metropolitan Life Ins. Co., 105 Wis. 218, 80 N. W. 1020, 1021, 76 Am. St. Rep. 905 is correct: 'Where the reasonable probabilities from the evidence all point to suicide as the cause of death, so as to establish it, in the light of reason and common sense, with such certainty as to leave no room for a reasonable controversy on the subject, a jury should not be permitted to find to the contrary and have such finding stand as a verity in the case, but the question should be decided by the trial court as one of law.'

"We will discuss briefly some of the authorities cited by the appellee. One is the case of Curtis v. Louisville City Railway Co., 14 Ky. Law Rep. 272, in which case the superior court said: 'A peremptory instruction is not authorized where the plaintiff has made out a prima facie case by his own evidence, no matter how strong and convincing the court may deem the defendant's evidence to be.'

"That case came to this court, and this court's opinion may be found in 94 Ky. 573, 23 S. W. 363, 15 Ky. Law Rep. 351, 21 L. R. A. 649, and with the opinion of the superior court before it this court did not adopt that language or approve it. Appellee cites the case of Mutual Life Insurance Co. v. Louisville Trust Co., 207 Ky. 654, 269 S. W. 1014. How that case can have any application to this one we are unable to see. He cites the case of Brunswick v. Standard Accident Insurance Co., 278 Mo. 154, 213 S. W. 45, 7 A.L.R. 1213. But an examination of that opinion will disclose that neither the pleadings, upon either side, nor the instruction, nor the evidence, except the policy, contained the word 'suicide'. The defense in that case was not rested upon a claim that the deceased had committed suicide. Hence that case is not applicable here. Appellee cites the case

of American Benevolent Association v. Stough, 83 S. W. 126, 26 Ky. Law Rep. 1093. That was an action upon a life insurance policy, and of course, the plaintiff's case was made out as soon as the policy was put in evidence, and it was shown that the insurer had been furnished with proof that the insured was dead. The insurer rested its defense upon the alleged suicide of the deceased and the burden was on it to prove that. In this case the beneficiary of this policy has alleged that Tuggle's death was accidental and in order to recover the beneficiary must sustain the burden of proving that. Appellee cites the case of Massachusetts Mutual Life Insurance Co. v. Bush, 236 Ky. 400, 33 S. W. 2d 351, which he says cannot be distinguished from this one. But we think it can. Bush was found dead seated in his automobile. The motor was running, he had his pistol in his lap, and it was on a public road. There were other circumstances tending to indicate his death was accidental. Thus we need say nothing about whether or not we would adhere to that opinion if the facts were not distinguishable from the facts in this case.

"So reserving all other questions, we have concluded the Court erred in overruling appellant's motion for a directed verdict.

"Judgment reversed."

Now, in the case at bar, it seems to me that for the Court to deny this motion, would be flying in the teeth of that. We have here a stronger case for the defendant than was had in the case I just read. We have an eyewitness to the fact that this man showed by his attitude at the dinner table, after he had left the table, the fact that he took two drinks of whiskey in the immediate presence of a witness, he showed a sullen ill-tempered attitude, he tore up his clothes, which was not the usual or normal thing to do. He then left the house

and went and got this pistol and was gone for twenty minutes. He came back into the room, and took the pistol and put it to his head and pulled the trigger. Now, those conditions are terrifying and heartrending, I know, but that's what happened. What has the jury got to decide? You can't say that because a man did a thing like that, that it was an accident. It may have been unnatural, something that could not have reasonably been anticipated, but he deliberately went out, got his gun, came back, was gone for a period of about twenty minutes, drank some whiskey, a couple of times. There is no evidence that anyone struck his arm. There is no evidence that his arm struck anything. I would certainly, as would the jury, as stated by counsel for both sides, have every sympathy for this family, but it would serve no purpose to have this case decided here, and proceed with it further, have it appealed, and have it brought back or reversed and dismissed. That is not serving any purpose whatsoever.

If there was anything at all on which the plaintiff could hang the possibility of the man having—of the pistol having been exploded by anything other than the trigger finger of the man who was killed. There is not even an imaginary idea that it happened any other way. In the first place the pistol is a very large pistol, unusually so, and to say that it exploded with no reason at all except that the trigger was pulled would be to ask for a credulity which this court doesn't possess.

Not only that, but we have in this case the further proposition that this man had, on prior occasions, while no witness testifies that he ever threatened to kill himself, he had on occasion gotten out this gun, flourished it around, and indicated that he would—actually—right in this very room, had shot through the ceiling, and on another occasion, in Indiana, had gotten out the gun and gone out on the walk and fired it off, and

on another occasion had gotten it out and kicked the furniture around, knocked the lamps off the table and did considerable damage to the home furnishings. Then he had gotten the pistol out and directed his wife to clean up the mess. Then, at this time, coming in and with no reason at all, except that the steaks were tough, got in a very surly and black mood. While they don't use the exact words, it is certainly more than a reasonable inference to say that his wife and family were afraid of him. He went through the house and sat down in front of the television and they could see that he was not at himself. Then he went out of the house, stayed for some several minutes and came back in the house with, apparently, this large pistol stuck into his belt. He took it out and put it to his head and killed himself. What has the jury got to decide? To say that there is even a suggestion of that being an accident is to call for a basic fact that doesn't exist in this case when the facts are all to the contrary.

At the time of the case which Mr. Hinton referred to, which was some twenty-four years before this case which I read of Prudential Insurance Company v. Tuggle's Administrator, which was decided in 1934, since that time, in Nugent vs. Nugent's Administrator, 281 Ky. 263, 135 S. W. (2) 877, the scintilla rule has been abolished. The scintilla rule was in effect at the time this Tuggle case was decided, and it has been followed since that time saying that even though there is a scintilla of evidence that the Court should not decline to give a directed verdict where the facts show to the contrary.

In my opinion, gentlemen, there is no point in prolonging something unless there is a basis of law on which it might rest. In my opinion, in this case it was conclusively shown that it was not the result of an accident but it was the result of a deliberate act on the

part of the deceased, under circumstances under which, by no stretch of the imagination, could the jury conclude that there was an accident. That will be the judgment of the court.

The Court: Members of the Jury, under the law, when the plaintiff has introduced its case and offered all the evidence it proposes to offer, and there is presented no issue of fact for the jury to decide, it is the duty of the presiding judge of the court to direct a verdict for the defendant.

The case which you have been trying is one involving the single question of whether or not this deceased, Maurice Trivette, committed suicide or whether he died as the result of an accident. The issue, as I say, is narrow, and under the evidence which has been offered to you here, there can be but one conclusion that can be reached, and that is that he took the pistol and put it to his head and killed himself. So, there is no issue of fact which the court could submit to you for your determination.

Where one meets a violent death, or an unnatural death, as we say, it may become a question as to how that thing occurred, whether it was an accident or whether it was a deliberate act. There can be no doubt from the evidence shown in this case, or the reasonable inferences which may be drawn from it, that this man did commit suicide. There could not possibly be drawn an inference or deduction that that gun exploded by any accidental means. It was a deliberate act of the decedent, Maurice Trivette.

So, I am going to direct you to find a verdict for the defendant. I have prepared here, through the Clerk, the following verdict: "Under direction of the Court, we the jury find for the defendant." (See Appendix, pp. 15a-27a).

APPENDIX II

No. 13910

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MILDRED C. TRIVETTE - - - *Plaintiff-Appellant*

v.

NEW YORK LIFE INSURANCE COMPANY,
Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Kentucky

Decided October 31, 1960

OPINION OF CIRCUIT COURT OF APPEALS

Before MILLER and POPE, Circuit Judges, and KENT, District Judge.

KENT, District Judge. This action is based upon four policies of insurance issued by the defendant company prior to the death of the insured, Maurice Trivette, of which the plaintiff widow was the beneficiary. Under the terms of the policies "double indemnity" was to be paid in the event of accidental death. The principal amount of the four policies was $30,000, which was paid by the defendant company. The District Court directed a verdict against the plaintiff (appellant) at the conclusions of the plaintiff's proofs.

The issue is whether the plaintiff is entitled to double indemnity for the death of the insured.

During the argument in this Court plaintiff's counsel conceded that the decedent shot himself. It was the theory and claim of the plaintiff that the decedent "might not" have intended to shoot the gun, that he "might not" have intended to kill himself, that he only intended to "scare" the members of his family. Admittedly, he put the gun to his forehead in the presence of the plaintiff and the gun was fired resulting in the death of the decedent. Plaintiff relies upon *Dick* v. *New York Life Ins. Co.*, 359 U. S. 427 (and other cases which need not be discussed), a case decided under the law of North Dakota in which the Supreme Court of the United States held that the burden was upon the insurer to establish that the death of the insured was due to suicide. Under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, this Court and the District Court are required to follow the law of the State of Kentucky. The trial court had before it the decision of the Court of Appeals of the State of Kentucky in *Prudential Ins. Co.* v. *Tuggle's Admr.*, 254 Ky. 814, 72 S. W. 2d 440. After that decision and prior to the argument of the principal case before this Court, the Court of Appeals of Kentucky decided *Prudential Ins. Co.* v. *Hattie Bell Redwine, Adm'x of Ewen*, 332 S. W. 2d 643 (1959). In many respects the facts in *Prudential Ins. Co.* v. *Redwine, supra*, were similar to the facts in the present case and as pointed out by the Court at 332 S. W. 2d 643, at page 645—"It must be remembered that the plaintiff had the burden on the whole case of proving death by accident. *Massachusetts Mut. Life Ins. Co.* v. *Bush*, 236 Ky. 400, 33 S. W. 2d 351."

In Prudential Ins. Co. v. *Redwine, supra,* the Court of Appeals of Kentucky approved its earlier decision in *Prudential Ins. Co.* v. *Tuggle's Admr., supra.*

The facts in the instant case are such as to require the same result as that reached by the Court of Appeals of Kentucky in *Prudential Ins. Co.* v. *Redwine, supra.* The District Judge could not submit the principal case to the jury for speculation or surmise as to some cause other than suicide for the death of the decedent. At the conclusion of the argument on the motion for a directed verdict Judge Swinford stated in part—

> "In my opinion, gentlemen, there is no point in prolonging something unless there is a basis of law on which it might rest. In my opinion, in this case it was conclusively shown that it was not the result of an accident but it was the result of a deliberate act on the part of the deceased, under circumstances under which, by no stretch of the imagination, could the jury conclude that there was an accident. That will be the judgment of the court."

For the reasons set forth by Judge Swinford as the basis for directing a verdict for the defendant, and on authority of *Prudential Ins. Co.* v. *Tuggle's Admr., supra,* and *Prudential Ins. Co.* v. *Redwine, supra,* the decision of the District Court must be affirmed.

POPE, Circuit Judge, dissenting.

Since I find myself unable to concur in the majority opinion, I think I should state the reasons for my disagreement. They are several.

The opinion assumes that the rule of *Erie Railroad Co.* v. *Tompkins* is to be applied here. As I shall indicate later, I think a more complete statement of the facts would call for a different result even assuming the propriety of the Erie Railroad Co. approach. But if, as I am convinced, this case is not ruled by Erie, then the reasons for a different result are even stronger.

I realize that in *Lovas* v. *General Motors Corp.*, 6 cir., 212 F. 2d 805, this court said that in a diversity case whether a plaintiff's evidence is sufficient to take the case to the jury is a question to be decided according to state law. But an examination of that case shows that it was decided, as the court said, upon principles that "are well settled under both state and federal law." It cannot be said that any different result would have been reached no matter which law, state or federal, was applied. In short, it cannot be said that the expressed view as to the applicability of the *Erie Railroad* case was necessary to the decision.[1] Our case, however, is one which might well turn on the question whether I am right in my view that, as put by Professor Moore,[2] "The sufficiency of certain evidence to raise a question of fact for the jury . . . should not be controlled by state law."[3]

As time goes on it becomes increasingly clear that, as often stated by the Fifth Circuit, "[t]he kind of jury trial to which the parties are entitled in Federal Courts under Rules 38 and 39 of the Federal Rules of Civil Procedure, 28 U. S. C. A., is that preserved by the Seventh Amendment to the Constitution, to which the doctrine of *Erie Railroad Co.* v. *Tompkins*, . . . is of course subservient." *Pogue* v. *Great Atlantic & Pacific Tea Company*, 242 F. 2d 575, 582.[4]

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[1] The *Lovas* case was one in which the physical facts were such that there was "no substantial evidence of probative value to support the appellant's charge."

[2] Moore's Federal Practice, 2nd Ed., § 38.10, p. 102.

[3] I am not suggesting a reexamination by this court, as now constituted. In some circuits with which I am familiar, reexamination under such circumstances is accomplished after reargument before the court sitting en banc.

[4] Other cases to the same effect in the Fifth Circuit are: *Reuter* v. *Eastern Air Lines*, 226 F. 2d 443, 445; *Revlon* v. *Buchanan*, 271 F. 2d 795, 800.

This is exactly the same principle applied by the Supreme Court in *Byrd* v. *Blue Ridge Cooperative*, 356 U. S. 525, 537, where the Court said: "An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. . . . The policy of uniform enforcement of state-created rights and obligations, . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury."

I am not suggesting that the *Byrd* case dealt with the precise question presented in the case now before us. It is plain that the Supreme Court has not thus far directly expressed itself upon the question which I here discuss.[5] But the clarity with which the Court there declares the principle which underlies the decision of the Fifth Circuit in the *Pogue* case, to my mind furnishes clear evidence that when it does find occasion to speak, the Supreme Court will agree with what was said in the *Pogue* case.

In my opinion there are compelling reasons for regarding the position of the Fifth Circuit as the only tenable one. Such is also the view of the Courts of Appeals for the Fourth, Ninth and Tenth Circuits. *Davis Frozen Foods* v. *Norfolk Southern Ry. Co.*,

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[5] *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, sometimes misunderstood, is discussed by Moore, § 38.10 supra, who suggests it should be regarded as "a novel application of the doctrine of 'the law of the case.'" I agree with Judge Magruder that it "had to do with the application of the doctrine of res judicata, which certainly is a matter of substantive law." *Schell* v. *Ford Motor Co.*, 270 F. 2d 384, 388 (dissenting opinion, cited infra, note 8). The most conclusive indication that the Supreme Court considers it has not decided this question is the fact that in *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 445, the Court noted the decisions of the Courts of Appeals without any reference to any decision of its own.

1953) 4 cir., 204 F. 2d 839, 842; *State of Washington* v. *United States*, (1954) 9 cir., 214 F. 2d 33, 40; *Smith* v. *Buck*, (1957) 245 F. 2d 348, 349, 9 cir.; *Allen* v. *Matson Navigation Company*, (1958) 9 cir., 255 F. 2d 273, 281-282.[6] *Diederich* v. *American News Co.*, (1942) 10 cir., 128 F. 2d 144; *Basham* v. *City Bus Co.*, (1955), 10 cir., 219 F. 2d 547; *Miller* v. *Irby*, (1955) 10 cir., 227 F. 2d 942.

As noted in *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 445, not all of the courts of appeals have agreed upon this proposition. An examination of those cases which have purportedly followed state decisions as to what constitutes a sufficient case for the jury convinces me that in the main they are distinguishable either on the ground that the court found it unnecessary in the particular case to pass upon this point, or because the case really involved a problem of state substantive law such as the existence of presumptions and the location of burden of proof.[7]

For instance, the latest discussion of a similar question in the Second Circuit is to be found in *Presser Royalty Company* v. *Chase Manhattan Bank*, (1959) 272 F. 2d 838, 840. There the court said: "In this diversity action brought in the Southern District of New York and involving only issues of state law the question whether the evidence was sufficient to take the case to the jury is *probably* to be determined by New York law." (Emphasis mine.) The use of the word

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[6] In this last case the court cited with approval the rule stated by Moore, supra, and the *Pogue* case, supra, and noted that the state court's decisions indicated that the state court would reach the same conclusion. See footnote 11, p. 282. Also in that case, although jurisdiction was predicated upon diversity of citizenship, the action was to recover for a maritime tort. See footnote 5 and accompanying text commented upon in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 376 (footnote 44).

[7] That these latter are to be regarded as questions of substantive law was stated in *Dick* v. *New York Life Insurance Co.*, supra, at p. 446.

"probably" clearly indicates that the court found it unnecessary for the purposes of the case to decide the question, and also that it had some reservations upon the question.

This is further indicated by the fact that the court called attention to a dissenting opinion of Judge Magruder expressing an opposite view. (In *Pierce Consulting Eng. Co.* v. *City of Burlington, Vt.*, (1955), 221 F. 2d 607, which the court cited, the court showed similar doubts as to whether state law controlled, citing Moore and cases from the Fourth and Tenth circuits.) Interestingly, although the court cited a number of other cases from the Second Circuit, it failed to cite its own decision in *Reynolds* v. *Pegler*, 223 F. 2d 429, 433-434, where it is said that the "better view" would seem to be that expressed by Moore and by decisions in the Ninth and Tenth Circuits. I am of the opinion that the question is still an open one in the Second Circuit.*

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* The question has not I think been presented for decision in the First Circuit although twice Judge Magruder, dissenting, has posed the question here discussed; on one occasion reserving judgment on the point, and on another suggesting that the point he sought to make would have been a better ground for the court's conclusion. These cases are *Metropolitan Coal Co.* v. *Johnson*, 1 cir., 265 F. 2d 173, dissent at p. 182; and *Schell* v. *Ford Motor Co.*, 270 F. 2d 384, dissent at 387. In the Third Circuit, that court purported to follow the local state rule as to what was required to make a case for the jury. *Lennig* v. *New York Life Ins. Co.*, (1941) 122 F. 2d 871; *Waldron* v. *Aetna Casualty Co.*, (1944) 141 F. 2d 230. It seems plain they are based upon a misunderstanding of the *Stoner* case, cited supra, note 5. In *Clay County Cotton Co.* v. *Home Life Insurance Co.*, 113 F. 2d 856, the Eighth Circuit appears to recognize the rule stated by Moore that in respect to the procedural questions a federal court in a diversity case will follow the federal law. However, in the final paragraph of the court's opinion it held that a motion for a directed verdict raised a question of substantive law, namely, whether aggravation of a pre-existing disease through accident constituted accidental injury; accordingly it followed the state law. In *Curry* v. *Pyramid Life Ins. Co.*, 8 cir., 271 F. 2d 1, 3, the court quoted with approval from the *Byrd* case, supra, the statement of that Court that "It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."

I am therefore confident that Professor Moore is basing his conclusion upon what is the great weight of authority in the federal courts when he stated in the section previously referred to that the sufficiency of certain evidence to raise a question of fact for the jury should not be controlled by state law but is rather a question of federal law under the federal system which, in the language of the *Byrd* case, supra, "distributes trial function between judge and jury and, under the influence — if not the command — of the Seventh Amendment, assigns the decisions of disputed question of fact to the jury."

If I am right in that, then, when the full facts in this case are considered it seems clear to me that the judgment should be reversed.

As I read the majority opinion, the facts of this not too simple case are recited in a single sentence where it is said decedent "put the gun to his forehead in the presence of the plaintiff and the gun was fired resulting in the death of the decedent." This statement is not only inaccurate but very incomplete.

At the time of his death Trivette was 45 years of age. He had two children by a former marriage, and appellant and he were married in 1945. They had four children born of their marriage, the eldest of whom was 10 and the youngest, 5. These four children and the youngest of the children by the former marriage lived with him and the appellant. He was engaged in the coal mining business and as an adjunct to it operated a garage. The business was prosperous; he drew a salary as executive vice-president and general manager of $700 per month. His wife and oldest son each drew a salary or dividend also. He had no business problems; he was attentive to and affectionate with his wife and children and within a week preceding his death he

had made plans to install a children's playground for his own and the community children on an adjacent lot. He had no health problems. In short, the evidence negatives any possible motive or reason for suicide.

The evidence does disclose that Trivette was given to occasional fits of anger in which his actions were so fantastic and bizarre as to indicate a serious mental instability. During these explosive tantrums Trivette would engage in violent actions usually accompanied by shooting of the pistol. Some 10 years previous to his death when the family lived in Indiana, Trivette became "quite angry" when he had had trouble with some hired hands and "he got the gun out," "stomped out the house," fired his pistol and was found outside sitting on the sidewalk. Some seven years later he became angry because of an interruption of his Saturday night dinner plans and "broke up all the things in the living room"; "just started swiping everything off the tables and wrecking them off, and there was glass all over the living room and dining room." He got his gun out and "slung it around just like he was swinging his hands around before and ordered his wife to clean up the mess." Approximately two years prior to his death in another similar tantrum he got his pistol and shot out the light in the center of the ceiling of his bedroom, the same room in which he was finally shot. The testimony indicated that after such demonstrations of anger he would quickly recover and often when they occurred he had been drinking whiskey.

On the occasion when he was shot he went into a similar tantrum. He had eaten dinner with his family and the steaks served had been selected by his brother-in-law with whom Trivette was out of sorts on account of the former's failure to repay a loan owing to Trivette; the steaks proved to be tough and Trivette refused to finish his dinner and became sullen. He con-

tinued sullen and incommunicative and then went to the garage to get some money and after about twenty minutes he returned to the house still in an ugly mood. He went into his bedroom and motioned to his wife to come in. His wife had bought him a shirt and a pair of slacks and he was about to pack a bag in order to spend a night at a motel to avoid night calls from the garage. At the sight of the shirt and slacks he became violent; he found the sleeves of the shirt about a quarter of an inch too long and tore it and the slacks saying: "Don't buy me any more clothes." He threw the torn slacks and shirt across the bed toward his wife; he was then standing in a narrow space between the bed and the wall with his right side next to the wall. At this point his wife started to get up to calm him when suddenly he pulled a gun from under his coat and belt with his right hand and with a single sudden motion "like a flash" fired the pistol upward. The pistol was a 44 Special Smith & Wesson revolver which measured 12½ inches from muzzle to butt with a weight without ammunition of 38 ounces. It was loaded with 5 cartridges each 1½ inch in length.

It is a permissible inference from the record that when Trivette "like a flash" and in a fit of blind anger suddenly jerked this extraordinarily heavy gun from his belt, he intended to do precisely what he had done before, shoot into the ceiling, and that in attempting to do so all in one movement, his elbow struck the wall by which he was standing and the shot was deflected to hit the side of his head and range upwards to the top of his head.[9]

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[9] The majority opinion states that he "put the gun to his forehead." This is inaccurate in two respects. The bullet entered just above and forward of the right ear. About the hole were powder marks ¾ of an inch in diameter from which it could be inferred that the muzzle was not against his head. The bullet came out "just to the left of the center line of the top of the head" and entered the ceiling of the room, ranging upward at about a 50 degree angle.

Mrs. Trivette testified that he was standing close to the wall; as he pulled out his gun and raised it, he pulled his arm back; and although she did not actually see his arm strike the wall, "I thought that he had because he was standing so close to the wall; I stood in the same position he did and I could not see how he could get the gun to his head without striking the wall."

I think that a jury would properly infer that the manifest purpose of Trivette was not to harm himself but to frighten his wife just as he had done on the prior similar occasions. The inferences are all against any purpose of self-destruction and an inference of accidental shooting is plainly suggested.

But if I am right in my view that this court ought to follow the federal rule as to what makes a case for a jury, then beyond the peradventure of a doubt were this case in the hands of the Supreme Court it would as summarily reverse this judgment as it did in *Williams* v. *Carolina Life Insurance Co.*, 348 U. S. 802, reversing 210 F. 2d 477; *Swafford* v. *Atlantic Coast Line RR Co.*, 350 U. S. 807, reversing 220 F. 2d 901; *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U. S. 907, reversing 221 F. 2d 62; and *Gibson* v. *Phillips Petroleum Corp.*, 352 U. S. 874, reversing 232 F. 2d 13. None of these are F. E. L. A. actions. All but one are diversity cases.

I am willing to go further: I feel certain that even the Kentucky court if presented with the facts which I have here set forth would say that this was a case properly to be submitted to the jury. I can find no resemblance between the facts here proven and those in the Kentucky cases the court here relies upon. That a jury may properly draw its own inferences from other

facts proven was recognized in *United Benefit Ins. Co.* v. *Schott*, 296 Ky. 789, 177 S. W. 2d 581; *Kentucky Home Mutual Life Ins. Co.* v. *Watts*, 298 Ky. 471, 183 S. W. 2d 499.

I have another and different objection to the result here reached. It relates to two of the four policies sued upon, and is based upon a long line of Kentucky decisions holding that in an action on a life policy which provides that self-destruction while sane or insane, is a risk not assumed by the insurer, recovery may be had if the insured was so insane that he could not understand the nature of his acts.[10]

At the oral argument counsel for appellee was queried about these cases, and asked why they did not require the submission to the jury of the question of Trivette's mental condition. In a supplemental brief, filed after the argument, appellee replied to this by stating that since this is a suit to recover double indemnity assurance, it is ruled by *Equitable Life Assur. Soc.* v. *Bailey*, 203 Ky. 339, 262 S. W. 280, "because nearly all Double Indemnity provisions . . . expressly *exclude* from Double Indemnity death resulting from infirmity of mind or body, or of illness or disease; and

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[10] *Equitable Life Assur. Soc. Etc.* v. *Bailey*, 214 Ky. 754, 284 S. W. 403; at 404: "Under a long line of decisions . . . it is held that in such circumstances [where a party is so insane that he does not understand the nature or the character of the act] there may be a recovery upon a life policy notwithstanding the provision in the contract attempting to protect the insurer from death by self-destruction." *Sovereign Camp of Woodmen of the World* v. *Havas*, 217 Ky. 846, 290 S. W. 690.

I make no effort to list numerous earlier cases to the same effect. Appellee's brief describes these as "the large group of 'suicide' defense cases where under the Kentucky law the company has the burden of proving that at the time of suicide he had sufficient mental capacity to appreciate the consequences of his act; and there was substantial evidence that at such time he was such a lunatic or so 'devoid of reason' that he *lacked* that mental capacity—and of course that substantial evidence created a jury issue on the *mental* capacity issue."

if the insured's self-destruction occurs when he has such infirmity his death is *automatically* excluded."[11]

This would appear to be a good answer so far as two of the policies are concerned. For those two policies contained substantially the same language as that found in the policy described in the case cited by counsel (which might be termed the first *Bailey* case). They provide that the double indemnity shall not be payable if the insured's death "resulted from any one or more of the following:—self-destruction, whether sane or insane; . . . infirmity of mind or body. . . . "

But the other two policies are quite different. They contained the usual suicide clause, "sane or insane," the same clause found in most of the policies in the large group of Kentucky cases previously mentioned, including the second *Bailey* case (284 S. W. 403), and the *Sovereign Camp Woodmen* case cited above. They contained no clause excluding coverage in case of death resulting from infirmity of mind.[12] In contrast to the

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[11] In this case cited by counsel the double indemnity clause provided: "This agreement to pay an increased amount in the event of death from bodily injury does not cover self-destruction, sane or insane . . . or death resulting directly or indirectly from bodily or mental infirmity." Said the court: "In other words, she could not, in order to entitle herself to the $10,000 ordinary life insurance, allege and prove that the insured was so insane as not to appreciate the nature and consequence of his act, and at the same time deny that his death resulted directly or indirectly from bodily or mental infirmity, in order to entitle her to the double indemnity insurance against accidental death."

[12] The clauses in these two policies read as follows: "The Company will pay to the beneficiary, subject to the terms and conditions of this policy, an additional amount (the double indemnity benefit) equal to the face amount of this policy upon receipt of due proof that the insured's death resulted directly, and independently of all other causes, from accidental bodily injury and that such death occurred within 90 days after such injury and before the earliest of the following: . . . (However, the double indemnity benefit will not be payable if such death results from (a) suicide, whether sane or insane, . . . nor will such benefit be payable if such death is caused or contributed to by bodily infirmity, or any illness or disease other than a bacterial infection occurring in consequence of an accidental injury on the exterior of the body."

other policies these exclude "death caused or contributed to by bodily infirmity." I need not cite cases to support the universal rule that such policies must be construed most strongly against the insurer. And by no possibility can it be said that a reference such as this to "bodily infirmity" means the same thing as if it said "infirmity of mind or body."[13]

Because the court directed a verdict at the close of plaintiff's case, we are not concerned here with the question of where lay the burden of proof, or in what form instructions should be cast. But it is plain to me that the rule of the first *Bailey* case has no place here. The issue of mental capacity should have been submitted to the jury under the rule of the second *Bailey* case and the many others in accord.

The conduct of Trivette at the time here in question was not only not normal and irrational, it was so strange, erratic and wild as to show the characteristics of a temporarily deranged and unhinged lunatic. The jury, to whom the issue of mental derangement should have been submitted in respect to the claim on these two policies, could well find mental unsoundness sufficient to bring the case within the Kentucky rule here mentioned.[14]

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[13] This is particularly true here where the same company issued the policies and issued them at a later date than the others.

[14] It is not contended that this evidence must be supplemented by opinion evidence. Mental condition or capacity may be proven by circumstantial evidence such as the person's outward conduct. Wigmore on Evidence, 3d Ed., §§ 227-228; Cooley's Briefs on Insurance, 2nd Ed., page 5472. *Inter-southern Life Ins. Co. v. Boyd*, 124 S. W. 333, 334: "All that we can do is to inquire into his surroundings, his condition, his personal relations, his domestic affairs, his habits, his traits of character, and from these make up our minds the best we can whether the suicidal act was intentional or the result of a state of mind that deprived the person of the power of understanding the naure and quality of his act."

APPENDIX III

STATEMENT OF FACTS

Relevant facts and circumstances culminating in the death of Maurice Trivette, according to undisputed evidence, are chronologically listed as follows:

On January 14, 1945, Maurice Trivette and the appellant were married (37a). He had two children, ages 21 and 13 by a former marriage (39a), and four children, born of this latter marriage, 10, 9, 7 and 5 years of age, respectively, at the time of his death (38a). The five youngest of these lived with him and appellant (39a).

On June 19, 1944, he procured the two insurance policies sued on, of the aggregate face amount of $10,000.00, with double indemnity in case of accidental death, and excluding suicide, sane or insane (3a and 4a).

On February 21, 1956, two more policies were procured of the aggregate face amount of $20,000.00, with similar (though not identical), double indemnity clauses (3a and 5a).

At the time of his death on October 19, 1957, he was engaged in the coal mining business, and also operated a garage at Virgie, in Pike County, Kentucky (41a). He was executive vice-president and general manager in charge of the coal company operation (New Virgie Coal Corporation), and he and his wife and son owned fifty percent of the stock of the corporation, and his brother, Charlie Trivette, owned the other fifty percent (41a and 102a).

The coal business was prosperous and Maurice Trivette drew a salary of $700.00 per month, and his wife and son drew a salary, or dividend, of $117.00 per

month each (42a, 102a-103a). The garage business was operated primarily to repair and maintain the coal mining equipment and was on an even keel (45a-46a).

Both of these enterprises continued operation on a successful basis up until the time of his death (103a-104a). He was devoted to his wife and children, and was attentive to and affectionate with them (80a-83a, 135a, 149a, 159a).

He died on October 19, 1957 (37a). On that day, and within the preceding week, he had made plans to grade and install a children's playground for his own and community children on a lot adjoining his home, which was next to the garage (43a-44a).

On the day of the decedent's death, his wife, the appellant here, had taken the five children to Bristol, Tennessee, primarily to have some dental work done for her step-son (52a) and while there had gotten her brother-in-law, a Mr. Morrison, who married Maurice Trivette's sister, to select some steaks for her to take home to supper (52a). She returned home to Virgie about 5:30 p. m. (53a). She and the children were greeted at the garage by the decedent in a cordial manner (53a). Her husband appeared to be in a normal good humor (53a, 179a, 182a-183a).

Maurice remained at the garage until time for supper. This was on Saturday. He had made up and distributed the payroll (110a, 179a and 182a).

He then went home about 6:30 p. m. (54a).

The residence was next door to the garage. His brother, Warren, saw him at the garage about 5:30, and wanted some Prestone that Maurice told him he was out of, but would order some for him and it would be there the following Monday. Warren said he was in a "very good mood" at that time (100a).

His wife had run his bath water (55a) and he cleaned up and changed his clothes at home, and took two drinks, or nips, from a pint bottle of whiskey. Mrs. Trivette testified she saw him take two drinks, or "nips" of whiskey that night while he was dressing (79a), but he was not drunk (80a). The family went into the dining room for supper somewhere around 7:30. The steaks selected by the brother-in-law in Bristol proved to be tough (55a).

Maurice Trivette was out of sorts with this brother-in-law because he had loaned him $7,500.00 some years prior thereto, which the brother-in-law had made no effort to repay (56a, 89a-92a). Maurice then became ill-humored and did not finish his steak and remained silent. The children went into the living room and he and his wife sat at the table for some time and drank about two cups of coffee. He then went into the living room and sat staring into space, and was sullen and incommunicative. (56a, 90a).

After a short time he went to the garage to get the money out of the cash register, as was his custom (57a). He habitually kept considerable money on hand to cash checks for customers and employees of the coal company (57a). He was gone about 20 minutes (91a). When he returned he was still in an ugly mood. He went into the bedroom occupied by him and his wife and motioned to his wife to come in. He became violent and tore up a shirt and a pair of socks which his wife had bought for him (58a, 92a-93a). He had decided to spend the night at a motel in order to get some rest and to avoid Saturday night calls from late travelers at the garage, as he had done on previous occasions (58a).

He packed toilet articles in a case for this purpose (58a). He had put the money from the garage, something over $900.00 (107a), in the pocket of a

sports coat that he was wearing (58a). He had also put five extra cartridges for his pistol in his pocket (100a-101a, 115a, 164a-165a, and 170a).

This was about 10 p. m. (136a-137a). He was standing between the wall and the bed about midway of this wall, with his right side next to the wall (61a), and his wife was sitting on a bench, or stool, in front of a dressing table near the corner of the opposite wall (60a). (See floor exhibit, 48a).

Mr. Trivette complained that the sleeves of the shirts were too long, and after tearing the shirt and the slacks, threw them across the room. At this point Mrs. Trivette started to get up to calm him down, as she had done on previous occasions (60a), when he suddenly jerked a 44-special, Smith & Wesson revolver (99a), from under his coat and belt, with his right hand, and all in one motion fired the pistol (64a). The bullet entered his right temple and ranged upward at a sharp angle, described by the undertaker as about a 50-degree angle (118a).

There was powder burn on his right temple, forming a circle around the hole made at the point of entry of the bullet about $^{3}/_{4}$ths or $^{7}/_{8}$ths of an inch in diameter (120a, 123a). Some of the brain was missing from the point of exit in the upper part of his head (122a). The bullet emerged from the top part of the head and entered the ceiling at a point about 7 inches from the connecting wall, near the corner opposite where Mrs. Trivette was standing (70a). The bullet was never found (72a).

He fell between the bed and the wall, a space of about 3 feet (63a), with his head away from where his wife had been sitting (62a).

Mrs. Trivette rushed to him and had his head in her arms when some of the neighbors came in and found them in this position (134a, 146a, 162a). An

ambulance was called, and Mrs. Trivette, Troy Childers, and Jimmy Ellis accompanied Maurice to the hospital in Pikeville (163a), but he was dead upon arrival (67a, 164a).

Mrs. Trivette described the action of her husband in jerking the pistol from his belt and firing as "like a flash" (64a, 66a, 186a), and said she thought he struck the wall with his right elbow. The court sustained objection to this and instructed the jury not to consider it. The witness' testimony on this point was as follows:

> "A. 203. And so far as I can remember—I am not positive about all this, but he was standing about like this (indicating), about like so (indicating), standing close to the wall, and when he jerked his arm back—like that (indicating)—about that fast. He was very angry. It isn't the same when you are calm. When you pull a gun out of your pants and put it up to your head with certain details, he didn't do that, with minute details. It was all in a flash.
>
> "Q. 204. Do you have any opinion as to whether his arm, or elbow, struck the wall?
>
> "Mr. Blackwell: Object, Your Honor, she can't give an opinion.
>
> "The Court: Objection sustained as to the opinion. Mrs. Trivette, you may state to the best of your knowledge, whether or not you saw the arm strike the wall.
>
> "A. I didn't actually see it strike the wall. I thought that it had because he was standing so close to the wall. I stood in the same position he did, and I didn't see how he could get the gun up to his head without striking the wall."

Mrs. Trivette was heard to say by one of the neighbors that came running into the house within a few minutes, while holding her husband's head in her lap,

and holding her hands over the wound to stop the blood, that 'he did not mean it' (163a-164a).

Her brother-in-law, Warren Trivette, who came into the room shortly after the accident, observed Mildred holding her husband, and testified that she said, 'he didn't mean to do it' (113a).

Some two years prior to this time, Maurice Trivette, in a similar fit of anger, had fired this same pistol in the same bedroom and had broken the ceiling light in the middle of the room (76a, 84a). On another occasion in Indiana, he had fired a gun while in an angry mood (77a-83a-84a), and on another occasion at his home at Virgie on a Saturday night when he had been called to pull in a wrecked car which interfered with plans that they had made to dine out, he came back home angry and broke up the living room furniture and furnishings, and flourished his gun about, but did not fire it at that time (77a, 85a). Mrs. Trivette testified that he had got over these spells almost immediately, and would be very sorry (78a).

Maurice Trivette left no will. He left no suicide note. He made no threats to kill himself. He did not do or say one single thing that indicated that he had any intention of taking his life.

He was not in any kind of financial difficulty or trouble of any kind, and he was in good health (96a, 97a, 106a, and 111a).

The coroner, Mr. Call, held an inquest on November 19, 1957 (68a, 88a, 123a, 127a, 135a, and 136a). An effort was made to introduce in evidence the cause of death as shown by the death certificate (39a-40a), and by the verdict of the coroner's jury, which showed accidental death by gunshot wound (127a, 136a). The lower Court refused to permit any questions about the coroner's verdict and held there was no issue as to the 'cause of death' (40a, 136a).

A distinct issue was made of the cause of death by the answer. Paragraph IV of the answer is as follows:

> "New York Life specifically denies that the insured, Maurice Trivette, died on October 19, 1957, from bodily injury effected solely through external, violent, and accidental means." (11a).

After proofs of death were filed with the defendant's insurance company, it paid the face of the policies, aggregating $30,000.00 to the appellant (38a), but declined to pay the double indemnity. It was stipulated that the policies were in full force and effect.

Complaint was filed in the Pike Circuit Court in March of 1958 seeking recovery under the double indemnity clause of each policy. (See complaint, 3a to 6a). Each of the four policies were filed and exhibited in evidence, and it was admitted and stipulated that they were in full force and effect at the time of Maurice Trivette's death (48a-49a).

The only portions of the policies that are relevant to the issues upon this appeal are the double indemnity clauses.

The clause in the first two policies is copied into the complaint (4a), and the clause contained in the last two policies is copied into the complaint (5a).

On April 18, 1958, the action was removed to the United States District Court for the Eastern District of Kentucky on the grounds of diversity of citizenship.

APPENDIX IV

DIFFERENTIATION BETWEEN THE CASE AT BAR AND THE (KY.) TUGGLE & REDWINE CASES

(1) Tuggle went underneath his house to a place where coal and kindling was stored, described in the opinion as a "dark and uninviting place." Trivette was in his own well-lighted bedroom at his home which he and his wife occupied daily.

(2) There was no one around or close to Tuggle at the time he shot himself. Trivette's wife was in the room with him. The door between the bedroom and the living room was open, and his small children were watching television in the adjoining room.

(3) Tuggle had been morose for at least 10 days before the tragedy occurred. He had passed old friends on the street without speaking to them. Friends said that he seemed to be in a study, or troubled about something, for a period of 10 days before the tragedy. Trivette had pursued his customary routine during the entire day and was in a normal good mood up to a very short time before the tragedy occurred, and not more than 2 and ½ or 3 hours at the most.

(4) In the Tuggle case, Tuggle had laid his rifle across a steel barrel, or drum, bracing the gun so as to place the muzzle against the side of his head, and then reached back and tripped the trigger. Trivette pulled the gun from his belt and fired in one quick motion, or "flash" as described by his wife, and without any aim, preparation, or deliberation of any kind.

(5) In the Tuggle case there were no powder burns on the side of the head showing that the gun was

placed directly against the side of the head. In the Trivette case there were powder burns showing that the gun was not placed against the head at the time it was discharged. It is common knowledge that if a person holds a gun in his hand, and attempts to point it at the side of his head without aiming or touching the head, it is impossible to tell where the gun is aimed in this position.

(6) In the Tuggle case there was blood and brains on the inside of the muzzle of the barrel, due to the back suction after the gun was discharged with the muzzle pressed against the side of the head. In the Trivette case, there was no evidence of any blood, brains, or tissue of any kind on or in the gun that had been used.

(7) In the Tuggle case it is stated that there was no apparent reason why Tuggle should have had a gun in the first place. In the Trivette case it was shown that Mr. Trivette kept money at his home taken from the garage each night, and that for years, he had kept a gun under the mattress in his bedroom for the purpose of protection.

(8) In the Trivette case it was shown that Trivette had a high temper, and at various times preceding the tragedy, that he would get his gun and shoot it, after which he usually became calm. In fact, it was shown that he had fired his gun into the ceiling in this same bedroom about two years before. The place where the bullet went through the ceiling had been patched, but was still visible, and a photograph was presented of this in the evidence. On two previous occasions he had flourished the gun around in a fit of temper. No such antecedent similar circumstances were in evidence in the Tuggle case.

(9) In the Tuggle case there was clear-cut evidence of motive for suicide, i.e., demotion. In this case, no motive whatever was shown. On the contrary, it was shown by uncontradicted evidence that the deceased had every reason to want to live—successful business, good health, a good home, a good income, and a devoted family consisting of a young wife and five young children and one grown son. It seems more apparent in this case that Trivette intended to do what he had done before, while in a rage, that is, pull his gun and shoot through the ceiling of the bedroom, and that he either misjudged the aim by not being able to see where the gun was pointed, or as his wife surmised, that his elbow hit the wall, causing the gun to deflect and fire into his head.

A careful study of the Tuggle case and the facts of this case reveals that there is no basis for comparison. While the facts of the Tuggle case show conclusively that Tuggle intended to commit suicide, the facts of the Trivette case show more conclusively that no such act was intended, and that death was accidental. At least, it must be admitted that the inferences from all the facts and circumstances point to accident, and not to intentional suicide.

In the Redwine case, the Kentucky opinion, after reviewing all of the evidence concludes "Clearly, Ewen *intentionally* ended his own life." (Emphasis ours.) (332 S. W. (2) 646.)

APPENDIX V

No. 13,910

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MILDRED C. TRIVETTE - - - - - - - *Appellant*

VS:

NEW YORK LIFE INSURANCE COMPANY - *Appellee*

ORDER DENYING REHEARING

February 28, 1961

This date this cause came on to be heard on the petition of the appellant, Mildred C. Trivette, for rehearing. On authority of *Lovas* v. *General Motors Corp.*, 212 F. 2d 805, (C. A. 6) 1954, the Court is satisfied that the conclusion reached in the original decision is correct. We do not read *Dick* v. *New York Life Ins. Co.*, 359 U. S. 427, 79 S. Ct. 921, as requiring a different result.

Judge Pope adheres to the same position which he expressed in his dissenting opinion herein.

It is therefore ordered, adjudged and decreed that the petition for rehearing be and it is hereby denied.

/s/ W. WALLACE KENT
District Judge
Sitting by designation

APPENDIX VI

PROOF OF SERVICE

I, O. T. Hinton, one of the attorneys for the Petitioners herein state on oath that I am a member of the bar in good standing of all of the State and Federal Courts within the State of Kentucky, including the Court of Appeals of Kentucky and of the United States District Court for the 6th Circuit, and have been for more than 40 years; that I am a member in good standing of the Pike County Bar Association, the Kentucky State Bar Association, and the American Bar Association, and do hereby certify that on the _____ day of May, 1961, I served copies of the foregoing petition for writ of certiorari upon the respondent, New York Life Insurance Company, as follows: By mailing a copy in a duly addressed envelope with first-class postage prepaid to its attorneys of record as follows: Thomas W. Bullitt, Kentucky Home Life Building, 7th Floor, Louisville 2, Kentucky, and R. Lee Blackwell, Kentucky Home Life Building, 7th Floor, Louisville 2, Kentucky.

_____

(O. T. Hinton)

STATE OF KENTUCKY
COUNTY OF PIKE

Subscribed and sworn to before me by O. T. Hinton this _____ day of May, 1961.

My Commission expires _____.

Witness my signature and seal of office this _____ day of _____, 1961.

_____

Notary Public, Pike Co., Ky.

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. ~~000~~ 103

MILDRED C. TRIVETTE, - - - Petitioner,

versus

NEW YORK LIFE INSURANCE COMPANY, - - - - - Respondent.

RESPONDENT'S BRIEF.

In Opposition to Petition for Writ of Certiorari.

R. LEE BLACKWELL,
1700 Ky. Home Life Building,
Louisville 2, Ky.

THOMAS W. BULLITT,
1700 Ky. Home Life Building,
Louisville 2, Ky.
Counsel for Respondent.

BULLITT, DAWSON & TARRANT,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.